SUPREME COURT, U. S.

DEC 30 1968

JOHN F. DAVIS, CLERK

No. 542

In the Supreme Court of the United States

OCTOBER TERM, 1968

ALVAN L. DUGAS,

Petitioner,

v.

STATE OF LOUISIANA.

In Opposition to Petition for Writs of Certiorari to the Supreme Court of Louisiana and the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
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Baton Rouge, Louisiana.

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Attorneys for Respondent

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REASONS FOR DENYING THE GRANTING OF THE WRIT

I.

Louisiana Law provides "before what purports to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voiuntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." (R.S. 15:451)

Whether or not the foregoing provision has been complied with is a question determined in Louisiana by the trial judge out of the presence of the jury and the ruling on the admissibility of the confession by the trial judge will not be disturbed on appeal unless clearly not supported by the evidence. *State v. Robinson*, 1949, 215 La. 974, 41 So. 2d 848.

The instant case was tried March 22-March 30 of 1965, after *Escobedo v. State of Illinois* 378 U. S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977, and prior to *Miranda v. Arizona*, which said decision is applicable prospectively from June 13, 1966. The ruling of Escobedo is therefore applicable. Unlike Escobedo, in the case at bar, the accused was a well educated man, had not requested nor been denied an opportunity to consult with a lawyer. At the time of his interrogation he was not under arrest. During his interrogation in the hospital by police officers an attorney friend of his appeared and requested that the interrogation be stopped, which was immediately done. At the time of the interrogation, although petitioner was experiencing some pain and discomfort, he was not in such a physical and mental condition as to be unable to freely and voluntarily be interrogated. A narcotic drug capable of producing sleep or drowsiness was administered to appellant some time after the interrogation. The attorney's physician, Dr. Bannerman, testified that the accused was rational and answered his questions intelligently, although possibly suffering some pain. Thus the trial court found, the State Supreme Court held, and the State contends that the guidelines of Escobedo applicable at the time

were not violated nor are the facts of Escobedo applicable to this case. See Per Curiam to Bill of Exception No. 3, Appendix.

II.

Appellant additionally complains that evidence produced by the State to the effect that he refused to voluntarily submit to a blood test to determine alcoholic content is violative of his Fifth Amendment privilege against self incrimination. It is the State's contention with reference to this issue that since *Schmerber v. California*, 384 U. S. 757, 86 S.Ct. 1826, 16 L.Ed. 908, and *Breithaupt v. Abrams*, 352 U. S. 432, 77 S.Ct. 48, 1 L.Ed. 2d 448, held that there was no Fifth Amendment privilege violation against the extracting of blood and that the Fifth Amendment applied only to privilege against evidence of a testimonial or communicative nature, that the complaint herein is without merit. Furthermore, the defendant elected to testify at the trial and testified that he refused the blood test because he thought it was unnecessary. See last paragraph of Louisiana Supreme Court decision, page VIII, appendix supplied by petitioner. Additionally, the attending physician testified that in his opinion if the blood test previously mentioned had been taken from appellant that it would not have shown anything of a positive nature. See Louisiana Supreme Court decision, appendix supplied by petitioner, page X. Thus, even conceding the validity of petitioners contention on this particular point, the Harmless Error Rule would foreclose any relief, since there is no conceivable way that particular testimony could have been prejudicial. Article

921 of the Louisiana Code of Criminal Procedure provides:

> "A judgment or ruling should not be reversed by an appellant court on any ground unless in the opinion of the court after an examination of the entire record it appears that the error complained of has probably resulted in a miscarriage of justice, it is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of constitutional or statutory right."

Article 845 of the Criminal Code of Procedure in part provides:

> ". . . the Court must sign the formal bills of exceptions, but may attach Per Curiam comments stating its reasons for the rulings. If the Court refuses to sign a formal bill of exception, its refusal may be reviewed on a Writ of Mandamus."

The Supreme Court of the State of Louisiana accepts the trial judge's Per Curiam as controlling in the absence of a note of evidence to the contrary. *State v. Koffman*, 211 La. 517, 37 2d 337, 1947; *State v. Guin*, 212 La. 475, 32 So. 2d 895 (1947). Thus by appendix respondent submits herewith the Per Curiams of the trial court with reference to its factual findings concerning these two issues.

CONCLUSION

It is respectfully submitted that the application for writs herein be denied in that no Fifth or Fourteenth Constitutional Amendments rights and privileges were violated with reference to the first and sec-

ond issues of contention and, additionally, that no prejudice resulted whatsoever with reference to the second contention.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Baton Rouge, Louisiana.

SARGENT PITCHER, JR.
District Attorney,
Nineteenth Judicial District,
Baton Rouge, Louisiana.

RALPH L. ROY,
Assistant District Attorney,
Nineteenth Judicial District,
Baton Rouge, Louisiana.

By: /s/ RALPH L. ROY
Assistant District Attorney

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared

RALPH L. ROY

Assistant District Attorney, East Baton Rouge Parish, Baton Rouge, Louisiana, who after being duly sworn, deposed and said:

That he has read the foregoing and that all of the allegations of fact and the documents composing the appendix are true and correct copies of the original.

That he has served prior to mailing same, copies upon Mr. Sam D'Amico, 610 Reymond Building, Baton Rouge, Louisiana, prior to filing same.

/s/ RALPH L. ROY
Assistant District Attorney

Sworn to and subscribed before me on this 23rd day of December, 1968.

/s/ DAVIS A. GUEYMARD
Notary Public,
in and for the Parish of
East Baton Rouge.

My commission expires at death.

APPENDIX

STATE OF LOUISIANA

VERSUS

ALVAN L. DUGAS

NUMBER 49,593

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISNANA

PER CURIAM TO BILL OF EXCEPTION NUMBER THREE

A reading of this formal Bill of Exception reveals that counsel for the accused has cumulated, combined and included two Bills of Exception which he reserved during the course of the trial into one formal Bill of Exception. This Court knows of no authority for this procedure. (L.S.A.-R.S. 15:499). It would appear that if he is relying on two or more Bills of Exception reserved during the trial he should present two or more formal Bills of Exception to the Court. Were it otherwise, counsel for the accused could just as well reserve five, ten or more Bills of Exception and then combine them all in one formal Bill of Exception.

The first Bill of Exception above referred to set forth in formal Bill of Exception Number Three presented to the Court deals with an objection made by defense counsel to the introduction into evidence of any admissions made by the accused, for the reason that the Assistant District Attorney did not *inform the jury*

in his opening statement that he intended to lay the foundation for said admissions prior to offering them in evidence.

In his opening statement the Assistant District Attorney informed the jury as to certain admissions made by the accused to the investigating officers and also he told the jury what the admissions were. The Assistant District Attorney related to the jury that the admissions would be testified to by one of the investigating officers, giving his name. This is all contrary to the objection made by defense counsel that the Assistant District Attorney did not inform the jury that the State would offer the admissions in evidence. Defense counsel made the opening statement of the Assistant District Attorney a part of his Bill of Exception. (See Tr. p. 183).

In his opening statement (Tr. p. 11 and 12) the Assistant District Attorney made the following statement. "Trooper Denison will testify that the defendant offered him an explanation as to how the collision occurred. He will testify that he, the defendant, admitted that he struck the bus; he admitted that it was his automobile involved in the collision; he admitted that he saw the stop sign; he admitted that he knew the intersection was there. Then he offered his explanation as to how the accident happened—". It is true, as defense counsel points out, the Assistant District Attorney, after mentioning in his opening statement that State witness, Trooper Leland R. Denison, would testify as to certain admissions made by the accused, stated

that the accused offered his explanation as to how the accident happened—Denison will tell you about this —(Tr. p. 12). Apparently, the State was relying on the admissions made by the accused and not on his explanation as to how the accident happened. Of course, the whole statements or admissions would go into evidence under R.S. 15:450. It was evident to the Court that the State was relying on the damaging admissions made by the accused, and not upon any explanation advanced by the accused as to how the accident happened.

L.S.A.-R.S. 15:233 requires the District Attorney in his opening statement to explain to the jury the nature of the charge and the *evidence* by which he expects to establish the guilt of the accused. The Court knows of no law or jurisprudence which requires the District Attorney to inform the jury in his opening statement anything about the *rules of evidence* or *criminal procedure* which he intends to utilize to establish the state's evidence.

In the second part of his formal Bill of Exception Number Three counsel for the accused recites that further "objections" were urged that the statements made by the accused were not shown to have been freely and voluntarily given "and defendant was not advised of his right to counsel. The Court overruled the objection and permitted the State to introduce evidence relative to certain admissions allegedly made by the accused." (This is a quotation from the Bill of Exception). Counsel for the defendant attached pages 270 through 272 of the transcript relating to this matter to his formal Bill of Exception. The record shows that counsel for

defendant did object to the State introducing the admissions of the accused until the foundation was laid. The court sustained this objection.

The State laid the foundation for the introduction into evidence of certain admissions made by the accused. This was done out of the presence of the jury. After hearing the evidence dealing with the predicate the Court ruled that the admissions were free and voluntary and were, therefore, admissible in evidence. When the Court so ruled defense counsel reserved a Bill of Exception to the Court's ruling in the following words: "To which ruling of the Court counsel for the defendant reserves a formal Bill of Exception and requests that the entire testimony on the subject, be made a part of the bill, together with the objection of counsel and the ruling of the Court." (Tr. p. 267).

It will be noted that counsel for the accused did not object to the Court's ruling when the Court ruled that the admissions made by the accused were admissible. He merely *reserved* a Bill of Exception. He made reference to an objection and asked that it be made a part of the Bill of Exception, but he did not *object* to the ruling of the Court at the time the ruling was made just after the predicate had been laid. It is basic, he could not make his "objection" a part of the Bill of Exception when, as a fact, he had not made an objection. Counsel, therefore, did not comply with the requirements of L.S.A.-R.S. 15:499. The Court could not pass upon the admissibility of the admissions made by the accused until it heard all the evidence dealing with the interrogation of the accused.

It will also be observed that in the formal Bill of Exception Number Three presented to the Court counsel states as a fact that he objected on the ground that the statements (admissions) were not freely and voluntarily given. He made no objection on this ground after the foundation had been laid. That, of course, was the proper time to urge his objection. It will also be noted that he stated he objected on the ground that defendant was not advised of his right to counsel. No such objection was urged by defense counsel either before the foundation was laid, or after it was laid and when the Court made its ruling.

Pretermitting these procedural considerations, the Court submits that, on the basis of the foundation laid, the admissions made by the accused were freely and voluntarily given by the accused to the investigating officer. The instant case was tried March 22 through March 30, 1965. The Escobedo rule (Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977) was in effect at the time. The guidelines enunciated in the Miranda decision, (Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694) which was handed down June 13, 1966, are not applicable. Unlike Escobedo, in the case at bar, the accused, a well educated business man, had not requested and been denied an opportunity to consult with a lawyer. He had not been arrested. When the attorney, who happened to be a friend of the accused, visited the hospital he remained with him a short time and then left the room. He went out into the hall. He later returned to the room and at that time requested

that the investigating officers not question the accused any further, ascribing as his reason the physical condition of the accused. Thereupon, they desisted their interrogation and left the hospital room. See State v. Ahrens, 196 So. 2d 250, and cases cited therein. The factual situation which formed the basis for the decision in Escobedo does not exist here.

The evidence showed that, although the accused at the time he made the incriminating statements was experiencing some pain and discomfort he was in such a physical and mental condition as to be responsible for his utterances. The record shows that it was sometime after the interrogation of the accused that a narcotic drug capable of producing sleep or drowsiness was administered to him. (See testimony of Doctor Bannerman which the Court makes a part of this Per Curiam). Doctor Bannerman testified that the accused was rational and answered his questions intelligently, although possibly suffering some pain. The Court was of the opinion that the testimony of the accused about sleeping a part of the time and about being drowsy intermittently during the course of his interview with the officers was rather inconsistent with his statement that at that particular time he was experiencing great pain. It would seem that if he was experiencing great pain that fact would preclude the possibility of sleep and drowsiness.

Respectfully submitted this_____day of_____, 1967.

s/FRED S. LEBLANC
Judge, 19th Judicial District Court

STATE OF LOUISIANA

VERSUS

ALVAN L. DUGAS

NUMBER 49,593

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

PER CURIAM TO BILL OF EXCEPTION NUMBER FOUR

This Bill of Exception was reserved while Trooper Leland R. Denison, a witness for the State, was testifying on direct examination. He was asked the following question by the Assistant District Attorney:

"Q. And did he tell you anything else (referring to the accused)?

A. We asked him if he would give us blood for an intoximeter test and he refused."

Just after the answer of the witness was uttered counsel for the accused objected and requested that the answer of the witness be stricken from the record on the ground that the witness had not been asked about tests; that the witness could not testify as to whether a test was not taken and on the further ground that (quoting from counsel's objection), "I say that asking him that and he said that he refused I say is not admissible evidence, like a lie detector test, it is the same thing." (Tr. p. 272 through 273). The Court makes these pages of the transcript a part of this Per Curiam.

In effect, counsel was objecting (1) because the answer was not responsive and (2) that testimony about any intoximeter test was inadmissible. As to the first part of the objection, the answer of the witness was a conclusion and did not recite what the accused told the officer directly, but it was responsive to this extent: it recited the fact that the accused refused to take the test. Indubitably, that meant, of course, that the accused refused to take the test by informing the investigating officer that he did not want to take the test. It is to be presumed that he refused to take the test by *telling the officer his wishes in the matter*. That is the usual, normal, sane, sensible manner of refusing a request. There is a presumption that the accused is sane and responsible for his actions. L.S.A.-R.S. 15:432.

Counsel for the accused reserved his Bill of Exception in the following words:

> "I will just reserve my bill now, if Your Honor please. Let the record show that we reserve a bill to all this testimony and make all of it a part of the bill."
> (Tr. p. 276).

Counsel reserved his Bill of Exception to the testimony, not to the *ruling* of the Court. He did not make his objection a part of the Bill of Exception when taking this bill.

Since, defense counsel, when reserving his Bill of Exception, did not request that his objection, the ruling of the Court and the Court's reasons for the ruling be

made a part of his Bill of Exception he did not comply with the requirements of L.S.A.-R.S. 15:499.

The Court's reasons for its ruling on the objection would have been given in the presence of the jury, but defense counsel waived defendant's right to have the Court pronounce its ruling in the presence of the jury (TR. p. 276).

It is submitted the evidence was admissible for the purposes announced in the ruling of the Court. It was held by the Supreme Court of the United States in Schmerber vs. California, 348 U.S. 757 (1966) that blood may be extracted from the accused for the purpose of conducting a blood test, even without his consent and against his will without violating his constitutional rights. In the case at bar, the record shows that the accused was merely asked if he would give the officer his blood for an intoximeter test.

Respectfully submitted this_____day of August, 1967.

/s/FRED S. LEBLANC
Judge, 19th Judicial District Court

STATE OF LOUISIANA

VERSUS

ALVAN L. DUGAS

NUMBER 49,593

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

PER CURIAM TO BILL OF EXCEPTION NUMBER FIVE

When the question quoted on the first page of this Bill of Exception was propounded to Doctor Moss Bannerman, a defense witness, on cross-examination, it was objected to by defense counsel on the ground that the question did not cover the entire test laid down in the case of State v. Hightower. 238 La. 876, 116 So. 2d 699.

From a reading of the quoted statement it is obvious that the statement is not a question. Just before the statement of the Assistant District Attorney was made to the witness the latter, in his answer to the previous question, was seeking information. He wanted to know what constituted intoxication from a legal point of view. (See Tr. p. 522).

Prior to the Assistant District Attorney making the quoted statement to the expert witness he propounded the following question:

> "Q. Now then, Doctor, I am going to give you a hypothetical question or case. Suppose that

> a person had had sufficient alcohol to put them under the influence of intoxicating beverages, and suppose that this person shortly after the intake of this intoxicating liquor got involved in an automobile wreck wherein two wonderful little girls were killed. Let's assume that he knew that he had been involved in this wreck wherein these two wonderful little girls had been killed. Would this not have a tendency to sober this person up or to in part take him out of the category of being under the influence of intoxicating beverages?"

This hypothetical question was not objected to by defense counsel. The witness answered the question as follows:

> "A. In answer to that hypothetical question, it would."
> (Tr. p. 521 through 522).

Later on during the cross-examination when the objection was made by defense counsel to the statement quoted in this Bill of Exception the Court observed that it was a good objection. The Court then stated that it had in hand the decision of the Supreme Court in the Hightower case, 238 La. 876, 116 So. 2d 699, and that if counsel for the State and counsel for the accused had no objection it would read the pertinent parts thereof in full. Counsel informed the Court that they had no objection to this procedure. The Court then read the applicable parts of the decision to the expert witness. Just as this was concluded the Court stated to Doctor Bannerman: "So you must consider all of

those together." (Tr. p. 523 through 526). At this point the Assistant District Attorney asked the witness this question: "Now, did you get all of that, Doctor Bannerman?" His answer was: "I believe so, yes sir."

The hypothetical question quoted on the second page of this formal Bill of Exception was then propounded to the expert witness. Defense counsel objected to the question and gave his reasons (See Tr. p. 525 through 530). The Court overruled the objection.

It is the opinion of the Court that the ruling was correct. This hypothetical question is practically the same as the hypothetical question set out on pages 521 through 529 of the transcript except that it assumes that the person involved was under the influence of intoxicating beverages as defined in the statute (L.S.A.-R.S. 14:98). The expert witness had been instructed by the Court as to what is meant by being under the influence of intoxicating beverages before he gave his answer. His answer was: "The answer is that an accident would tend to have a sobering effect." (Tr. p. 530).

Among other acts of criminal negligence allegedly committed by the accused the State had the right under the opening statement of the Assistant District Attorney to show, if it could, that the accused at the time of the accident was under the influence of intoxicating beverages. It had the further right to prove, if it could, that the accident itself produced a sobering effect upon the accused. Besides, Doctor Bannerman had previously testified that when he saw the accused

at the hospital after the accident at about 8:00 or 8:15 o'clock P.M. it was his opinion from what he observed of the accused (he noticed a smell of alcohol) that he was not under the influence of intoxicating beverages at that time (Tr. p. 506). The objected testimony tended to explain or rebut this testimony and was admissible for that purpose.

Respectfully submitted this ____ day of August, 1967.

/s/ FRED S. LEBLANC
Judge, 19th Judicial District Court

STATE OF LOUISIANA
VERSUS
ALVAN L. DUGAS

NUMBER 49,593
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

PER CURIAM TO BILL OF EXCEPTION NUMBER SEVEN

When the question quoted in this Bill of Exception was propounded by defense counsel to Doctor Moss M. Bannerman, a defense witness, then testifying on redirect examination, the Assistant District Attorney objected as follows: "Now I object to that. I don't think this doctor can state whether or not something would be finally determinative. What is finally to be determined about this thing is left with these five men on the jury." (See Tr. p. 541 through 542). Before ruling on the objection the Court in an effort to determine whether the witness was an expert in this field, attempted to ascertain whether or not Doctor Bannerman had had sufficient training and experience in administering blood tests and in evaluating the results thereof to express an opinion as to whether the accused was or was not under the influence of intoxicating beverages as defined in R.S. 14:98 and as that article of the Criminal Code has been interpreted by the Supreme Court. In this connection, the court inquired of the doctor as to whether he had had that kind of training. His answer was: "As far as specific figures are con-

cerned, Judge, I have not. Should I tell you what my answer would be and see if that is sufficiently close to qualification?" (See Tr. p. 543). The Assistant District Attorney objected to the witness answering the question which had been previously put to him by defense counsel on re-direct examination. The Court took the position that it was not proper to permit the witness to answer the question by expressing an opinion and then let the Court determine from his answer whether his answer indicated that he was sufficiently qualified as an expert to express an opinion in the first place. Defense counsel at this point made no request to have the witness qualify as an expert. The Court then sustained the objection of the Assistant District Attorney to the question set forth in this Bill of Exception. Defense counsel thereupon reserved a Bill of Exception. Thereafter, defense counsel questioned the witness relative to his experience in the matter under discussion. Doctor Bannerman informed the Court as to what experience he had had in the premises. Then counsel for the defendant propounded the following question: "And are you in a position to give us an opinion based on a reasonable degree of medical certainty, which, of course, would take into account all of the other cases you have seen in your twenty some odd years of medical practice, as to whether or not that same test, blood test, if given to Mr. Dugas on February 3rd, 1964 would have shown him to be under the influence of alcoholic beverages?" The Assistant District Attorney objected to the question on the ground that it was practically the same question as the one

previously asked the witness, and on the further ground that the witness had stated that he was not an expert "in that field." (Tr.p. 545 through 546). He did not seek permission of the Court to traverse the witness on his qualifications as an expert. The Court felt at this point that the witness had shown sufficiently that he was competent to testify as an expert and overruled the objection of the Assistant District Attorney. The witness answered the question and expressed the following opinion: "I would feel that the test would not have been showing sufficient alcoholic content to indicate that he was under the influence of intoxicating beverages at the time. To clarify this I might say this, that the test is made by the determination of the gross amount of alcohol in the volume of the blood. It is taken by a technician, read by a technician, and certain findings are reported. Now I don't want to mislead the Court to the fact that I know the range of the findings. In essence if a high, if a finding above a certain level is given, it is pretty good presumptive evidence of intoxication. If it is below a certain level it is usually the reverse. There is a wide variation according to individuals however." (See Tr. p. 548).

It is apparent to the Court that the accused received the full benefit of the expert testimony of the witness in connection with blood tests and consequently suffered no prejudice.

Respectfully submitted this ____ day of ____, 1967.

/s/ FRED S. LEBLANC
Judge, 19th Judicial District Court